

AUGUST B. LANDIS, Assistant United States Trustee
State Bar # IA PK9228

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UNITED STATES DEPARTMENT OF JUSTICE

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SARA L. KISTLER

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

USA Commercial Mortgage Company
06-10725 -- Lead Case

USA Capital Realty Advisors, LLC
06-10726

USA Capital Diversified Trust Deed Fund, LLC
06-10727

USA Capital First Trust Deed Fund, LLC
06-10728

USA Securities, LLC
06-10729

Debtors

Jointly Administered

Chapter 11 Cases

Judge **Linda B. Rieggle** Presiding

Date: June 15, 2006

Time: 9:30 a.m.

Place: Courtroom # 2, Foley Federal
Bldg.

Affecting:

☒ All Cases

or Only:

☐ USA Commercial Mortgage Company

☐ USA Capital Realty Advisors, LLC

☐ USA Capital Diversified Trust Deed Fund,
LLC

☐ USA Capital First Trust Deed Fund, LLC

**THE UNITED STATES TRUSTEE'S LIMITED OPPOSITION TO
COMMITTEES' JOINT MOTION PURSUANT TO 11 U.S.C. §§ 105(a),
107(b), 1102(b)(3)(A) AND 1103(c) FOR NUNC PRO TUNC ORDER
CLARIFYING REQUIREMENT TO PROVIDE ACCESS TO INFORMATION
(AFFECTS ALL DEBTORS)**

To the Honorable **LINDA B. RIEGGL**E, United States Bankruptcy Judge:

The United States Trustee submits its limited opposition to the Committees' Joint Motion
Pursuant to 11 U.S.C. §§ 105(a), 107(b), 1102(b)(3)(A) and 1103(c) for Nunc Pro Tunc Order

1 Clarifying Requirement to Provide Access to Information, and states:

2 1. The United States Trustee's opposition is limited to the exculpation language found at
3 page 17, paragraph 33(e), of the joint motion filed by the Committees.

4 2. In particular, the proposed exculpation language in the Committees' joint motion is
5 overly broad. On its face, the exculpation provision contained in the Committees' joint motion
6 could be construed to eliminate liability even for acts that constitute a breach of fiduciary duty,
7 gross negligence, willful misconduct, fraud, criminal misconduct, or breach of a confidentiality
8 agreement or order. This exculpatory language, if approved, would effectively void their
9 fundamental duty to their constituents. ("It is well recognized that, to fulfill these roles, the
10 members of an official committee owe a fiduciary duty to their constituents... ." *In re Refco, Inc.*,
11 336 B.R. 187, 195 (Bankr.S.D.N.Y. 2005)) Without limitations, the proposed language goes far
12 beyond reasonable protections and constitutes a waiver of their fundamental obligations.
13 *Compare* Joint Motion, p. 7, para. 33(e) *with In re Refco, Inc.*, 336 B.R. at 202-03 (order
14 approving narrowly tailored exculpation clause in connection with committees' motion regarding
15 access to information under 11 U.S.C. § 1102(b)(3)(A)). Further, in other cases where the issue
16 of limited access has been addressed, no exculpatory language is contained in the order. *See In re*
17 *Nobex Corporation*, Case No. 05-20050, Order dated February 10, 2006; *In re FYYi*, Case No.
18 05-2001, Order dated November 17, 2005 (both Judge Walrath orders, District of Delaware).

19 3. Any order entered by the Court approving the Information Protocol contained in the
20 Committees' joint motion should expressly provide that if actions are taken under that
21 Information Protocol which constitute a breach of fiduciary duty, gross negligence, willful
22 misconduct, fraud, criminal misconduct, or breach of a confidentiality agreement or order, the
23 responsible party or parties shall remain liable for their actions notwithstanding any exculpation
24 provisions contained in the Committees' joint motion or the Court's order. *See Refco*, 336 B.R. at
25 202.

1 **WHEREFORE**, the United States Trustee objects to approval of the Committees' joint
2 motion to the limited extent set forth above.

3 Respectfully submitted,

4 **SARA L. KISTLER**
5 **ACTING UNITED STATES TRUSTEE**
6 **REGION 17**

7 By: /s/ August B. Landis
8 August B. Landis, Assistant United States Trustee
9 United States Department of Justice

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